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THE FORUM.

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STATE BAR ASSOCIATION ANNUAL REPORT.

The eighth annual report of the Penna. Bar Association has been placed in the library. The report contains some interesting statistics with reference to admission to the Bar in this state. These statistics are published in a table showing the number of successful and unsuccessful candidates for registration and for admission to the Bar of each County in the state. The table shows that throughout the state, during the year 1901, 1330 applications in all were acted upon; 706 for registration and 624 for admission. Of the latter, 187 were attorneys from other jurisdictions; 122 of these were admitted on the ground of comity, 28 on results of examinations, and 37, rejected; 539 students were registered, and 361 student candidates were admitted to the Bar. Exclusive of comity admissions, there were 1208 applications acted upon; 832 or 69 per cent. were from nine counties having 20 or more applications each during the year; of the remaining 376 applications, 264 were from counties with from 10 to 20 applications each, and the balance of 112 were from counties each with less than 10 applications.

Exclusive of Philadelphia, the ratios for the state for each 20,000 inhabitants are 1.01 for admission, 1.48 for registration.

Philadelphia county leads in the number of admissions on law school diplomas; Cumberland county comes next. The presence of the University of Pennsylvania Law School in the former county and Dickinson School of Law in the latter is responsible for these counties leading in those admissions, the diplomas of these schools being accepted in the counties in which the schools are located. In Philadelphia 78, or 59 per cent. of the 131 admissions, were on law school diplomas. In Cumberland county 18, or 90 per cent. of the 20 students admissions, were on law school diplomas. In Luzerne county 2, or 8 per cent. of the 25 admissions, were on law school diplomas.

In Lackawanna, Lycoming, Venango, Lancaster counties there were no admissions on diplomas.

There evidently is not much doing in a legal way in Sullivan, Mifflin, Juniata, Pike and Fulton counties. In neither of these counties were there registrations or admissions during the year.

ANNUAL PRIZES.

The following is a list of the prizes to be distributed at the close of the term:

THE WILLIAM D. BOYER PRIZES.

William D. Boyer, A. M. LL. B., an alumnus of the school and a member of the Lackawana County Bar, has offered four prizes of twenty-five dollars each, for excellence in work to be indicated by the dean.

Prize No. 1 is offered to the Middler that shall do the best work in the Law of Evidence.

Prize No. 2 is offered to the Junior that shall do the best work in the Law of Contracts.

The other two prizes can be competed for only by members of one of the three athletic teams, football, baseball and track.

Prize No. 3 will be given to such student of any class, having the above qualification, as passes the best examination in the law of Torts, provided that his paper shall not be inferior to any five submitted.

Prize No. 4 will be given to such student of any class, having the above qualification, as writes the best essay on the Quashing of Indictments in Pennsylvania. There must be at least three competitive essays submitted, otherwise this prize will not be awarded.

THE DEAN'S PRIZES.

A prize of $25 is offered to such Senior as shall have done the best work in Constitutional Law, Federal and State.

A prize of $25 is offered to such Junior as does the best work in the law of Real Property.

ITEMS OF INTEREST ABOUT THE SCHOOL.

The Junior class was subjected to a special examination on the intestate laws of Pennsylvania and New Jersey, on January 17th. The students residing in Pennsylvania were examined on the Pennsylvania statutes, and the students residing in New Jersey on the statutes of that state.

The Senior class is receiving Corporations under Dr. Trickett, and Partnership and Bankruptcy under Professor Hutton. Bills and Notes will follow Corporations, and Landlord and Tenant, and Insurance, will be taught after the class has finished Partnership and Bankruptcy. This will be the first class to receive instruction on the subject of Landlord and Tenant. The subject heretofore taught instead was Quasi Contracts. The substitution of the former for the latter subject was done at the request of the class.

Delaney of the Senior class was seriously ill during the beginning of the present term.

The College Dramatic Club will produce the comedy, "Charley's Aunt," some time next month. Flynn and Lannard of the Middle Class have been assigned prominent parts.

The first basket ball game of this season was played in the gymnasium, Friday evening, January 16th, between Dickinson and Allbright. The former won, the score being 40 to 10. Prickett and Ammerman were the Law men who participated. The former played part of the second half. During the time that he was in the game, he threw four baskets, and his playing at times was remarkably fast. His work has been favorably commented upon since the game, and it is hoped that he will be retained as a regular member of the team.

Kurtzman of the Junior Class did not return after the Christmas vacation. He has gone into the life insurance business.

Ed. Spencer, a student at Mercersburg Academy, was a guest of his brother Charles of the Middle class during the fore part of the present month.

Miss Miller of the Junior class did not return since the Christmas vacation. She will continue her law studies in an office in Scranton where she resides.

Jos. Boughton, a prominent member of the McKean County Bar, has been appointed judge of that county to succeed Judge Morrison, who has been appointed a member of the Superior court, to succeed Judge Mitchell. Judge Boughton has been a member of the McKean County Bar for 18 years, during which time he was twice elected District Attorney, and was identified with some of the largest cases that were tried by that tribunal. His son Victor is a member of the Senior class.

Claycomb of the Middle class is becoming prominent as a lecturer and an author. During the summer vacation he lectured in the Methodist church in Alum Bank, Pa., before a large audience. His subject was "The Highway to Success." During the past few weeks there appeared from his pen in the Bedford County News an interesting description of the Carlisle Indian School, and its students. Accompanying the description were half tone cuts of the school, of Major Pratt, and of several members of the faculty.

Harvey Burkhouse, a member of last year's Junior Class, who did not return last fall, has resumed his studies with his class since the present term began. Business interests prevented his returning until after the holidays.

Three new men have been enrolled as members of the Junior Class since the opening of the present term. They are: Patterson, of Altoona, Pa; Tyler, of Port Alleghany, Pa., and Wackerman, of York, Pa.

Candidates for the base ball team reported for practice in the gymnasium, Saturday, Dec. 17th. Wolf, Parks, Hassert, Reeser and Setzer are the Law men who have reported. Wolf will, no doubt, be selected to catch on the varsity team. He is a fast and experienced player, and will considerably strengthen the team. While a student at Mt. St. Mary's College he caught for three years on the first team there, and since graduating from that institution he has played with some fast amateur teams in the vicinity of his home, Johnstown, Pa.

The Senior Class has organized a special class in Practice. Senator Weakley has charge of the class. One evening each week he will lecture in the large lecture room in the Law School.

For general excellency in their examination in Decedent's Estates the following members of the Middle class were honorably mentioned by Professor Hutton at the opening of the present term: Benjamin, Hillyer, Amerman and Albertson. Neatness of work and knowledge of the subject were the criteria upon which the selections were based. The examination which was conducted just before the close of the last term was comprehensive but not difficult.

The third of the series of mid-winter dances that is being conducted by the Comus Club, was held in the Armory, Friday evening, January 16th. Among the law students who attended were: Wilson, Dively, Spencer, Benjamin, Prickett, Hillyer, Kress, Vera, Heller, Gillespie, Lloyd, Core, and Longbottom. Professor Hutton was also present.

NEWS OF THE ALUMNI.

Daniel Kline of Freeland, a member of the class of 1901, was recently appointed Deputy Register of Wills of Luzerne county. His office will be in Freeland, and his jurisdiction will comprise the lower end of the county. Luzerne is such a large county and it is so inconvenient for the residents of the southern part of the county to reach the county seat, that the Register of Wills usually appoints a deputy in the southern district. There is no compensation connected with the appointment. It is always given to a lawyer, the theory being that the amount of practice that he will receive from performing the duties of the office will sufficiently compensate him for his labor.

Taylor '01 was in town during the holidays. He is residing in Grand Encampment, Wyoming, and after qualifying will practice law there. One year's residence in the state is required before applicants for admission to the bar can take the examination. He will be eligible to take the examination in a few months.

Among the Alumni in town during the present month were: Elmes '02; Kline '01; Katz '01; Kern '01; Holcomb '01; Hess '01; Thorne '02.

At the session of the Supreme Court in Phila. this month, the following graduates of Dickinson Law School were admitted to practice in that Court: Katz '01 and Tribley '98, of Phila. Co.; Haas '98, Schuylkill Co.; Glennon '96, Holcomb '01, Luzerne.

Mitchell '01 is employed in the legal department of the Standard Oil Company. At present he is located in West Virginia.

Elmer Welsh, who was graduated last June, was recently admitted to the York county bar, having passed the examination prescribed by the court of that county.

Schnee, a member of last year's Middle class, who did not return this year, was in town during the present month. He was admitted to the Lycoming County Bar in November, and to the West Virginia bar the early part of this month. He has not yet decided where he will practice.

John '99 of Shamokin, was in town for several days during the present month.

Geo. Brown '96 is engaged in the coal business. He is a member of a corporation composed principally of Philadelphia capitalists. The company owns a valuable tract of coal land in the vicinity of Freeland, and has begun to mine coal from it.

MOOT COURT.

WM. BECKER vs. PHILLIP WEIDNER.

Negligence—Rights of a pedestrian—Icy sidewalk—Failure of owner to remove the ice.

STATEMENT OF THE CASE.

Weidner had for twelve years owned a house fronting on High St., and standing back one foot from the pavement. The water falling on the roof was conducted by a spout to the western corner of the roof and thence by a spout down the front of the house to the distance of one foot above the ground. The spout here had a bend, one arm of it stretching nine inches along the top of the ground and two inches above it.

On January 11th, 1899, the water running down the pipe had spread over the pavement on its way to the gutter and had frozen, and Becker, while walking on the pavement, fell on the ice and was hurt. He brings trespass. The borough authorized gutters of the kind in question.

CARLIN and CLAYCOMB for the plaintiff.

Owners of premises must not obstruct or impede the passage of pedestrians.

Robert Todd v. City of Troy, 61 N. Y. 506; Pomfroy v. Village of Silver Springs, 104 N. Y. 459; McLaughlin v. City of Corry, 27 Pa. 109.

DELANEY and HUBLER for the defendant.

47 Pa. 300; 14 Gray 249; 93 N. Y. 12; 4 Cushing 365; 102 Mass. 329; 99 N. J. 654; 85 Pa. 293; 80 Pa. 373; 94 U. S. 469; 62 Pa. 353.

OPINION OF THE COURT.

Becker brings trespass for injuries received by reason of a fall occasioned by slipping on ice accumulated on a pavement in front of Weidner's house. It appears from the statement of facts that the borough authorized gutters of this kind, and Weidner to preserve his property from the drippings of the roof of his house, constructed a pipe along the edge of the roof, and thence down the side of the building. The spout had a projection of nine inches from the house, which was within three inches of reaching the pavement.

By the law of falling bodies, the water would have had a sufficient velocity after it left the orifice to strike directly on the pavement, and this presents the important question for the consideration of the court.

What are the rights of a person who is lawfully using a pavement and is hurt by slipping on ice that is caused by the artificial drainage placed there by the property owner? If there was evidence on which to base an opinion, the conclusion would not be hard to reach, as it could then be ascertained as to whether the plaintiff was negligent in a contributory manner or not, in attempting to walk on the pavement in its icy condition. In 12 W. N. 409, the court held that even if the borough was negligent in allowing a ridge of ice to remain on the pavement, if a person who was injured knew of its dangerous condition and attempted to cross, when he could have avoided the accident by passing out into the street, he was guilty of contributory negligence and could not recover.

It is argued by counsel for the defendant that the property owner had a reasonable time in which to remove the ice, and that the burden of proof is on the plaintiff to show that such time has elapsed before he can recover. We cannot agree with this contention. All the legislation providing and cases holding that a property owner has a reasonable time to remove snow and ice from his pavement, have

reference to the accumulation of snow and ice from natural causes, over which the property owner had no control. But no case has gone so far as to apply this rule if the owner has been the direct cause of the water falling there, by means of a man-trap, such as pipes of this kind are. Had the defendant extended the spout to the edge of the gutter underneath the pavement, and the same results have followed, the above rule would apply, but since he saw fit to allow the water to flow across the sidewalk in an atmosphere such as we have in this state in January, he certainly knew that the foot-way would at times be dangerous to pedestrians. As the plaintiff has fully shown that the accident occurred on account of the slippery condition of the sidewalk, and as his right to the sidewalk cannot be disputed, the presumption of law is in his favor, *i. e.*, that he acted as a reasonable man would act. The burden of proof is, therefore, on the defendant to show that the plaintiff contributed to the injury, and as he has not offered any evidence to establish this fact, we hold the plaintiff can recover.

The case in 192 Pa. 574, is not in point with this case, as the person injured in that case knew of the obstruction and passed over it several times; besides the chute in the above case was authorized by the borough; in this case it was the gutter and not the means the defendant used to convey the water to the gutter that were authorized.

Judgment for plaintiff.

DEVER, J.

OPINION OF THE SUPREME COURT.

Had rain fallen on the pavement and frozen, or had snow fallen, it might not have been the duty of Weidner to Becker, to remove it. Even though a valid municipal ordinance required Weidner to remove it, it would not result that a duty would be thereby created toward Becker. The breach of the ordinance might expose to the imposed penalty, but give no right of action to Becker. City of Rochester v. Campbell, 123 N. Y. 405; Tremblay v. Harmony Mills, 171 N. Y. 598; Hartford v. Talcott, 48 Conn. 525; 2 Dillon, Munic. Corp. pp. 1261, 1273, 1315.

Weidner's liability, if there is any, arises not from the fact that water fell and froze upon his pavement, or that it was allowed by him, after so falling and freezing, to remain upon the pavement, but from the fact that he caused it to fall on the pavement. The rain dripping on his roof was thrown into the spout along its edge, and thence conducted in a stream to the pavement below, over which it was thus caused to spread, and on which to freeze.

If he had, in freezing weather, thrown several tubfulls of water over the pavement, he would have been liable to such as, in the careful use of the pavment, suffered harm. He as clearly causes the roof water to come on the pavement, as if he had cast it there from the tub. He has built his roof and spout so that the water comes to the pavement, and he has intended that it should come to the pavement. He would have done this with impunity in the absence of an ordinance. had nobody been hurt in consequence. But somebody has been hurt.

It was not very strenuously suggested that the injury to Becker was too remote. By no means. Any sensible man would anticipate that in cold weather, water on the pavement would freeze,—that there would be pedestrians, and that in attempting to walk on the icy portion of the pavement, they would be in danger of falling. Many might not fall, but if any fall, Weidner must make reparation.

It is suggested that the borough by not prohibiting spouts of the kind, assented to them; nay, that it expressly authorized them. Let us concede that it did. That does not change the duty of Weidner towards Becker. He has been invited to use the foot-walk by the laying out of the street, and the division of it into carriage way and sidewalk. The borough cannot so far legalize nuisances put on the pavement by individuals, as to destroy their duties toward pedestrians, to avoid making it dangerous. An ordinance of that import would be unreasonable, illegal and void.

Should it be suggested that Becker should have sued the borough, the answer is at hand. The borough was, possibly, negligent in allowing spouts to be so maintained, that they would flood the pavements with water, which, in cold weather, would freeze. If it was, it would be liable to an action by Becker. But its

negligence is distinct from Weidner's. His is active; it's passive. He causes the water to flow on the sidewalk; it tolerates or suffers his doing so. Each is liable for his several act. That of one is not absorbed into the other's. Tremblay v. Harmony Mills, 171 N. Y. 598.

Judgment affirmed.

JOHNSON vs. BROWN.

Constitutional law—Due process of law—Limits of the police power of a state—Seizure of gaming devices—Act of Mar. 31, 1860, P. L. 382.

STATEMENT OF THE CASE.

Plaintiff owned a musical slot machine, which was summarily seized by the police without any arrest or charge against the owner, on the ground that it was a gambling device. It was shown that the machine could be used for perfectly legitimate purposes, such as operation as a music box, or to register the number of customers, etc., but that it could be used for certain gambling devices. The contention was that there was a taking of property without due process of law within the constitutional inhibition.

WALSH and DELANEY for plaintiff.

The act authorizing seizure violates XIV Amendment of the Constitution. Mode of seizing the property is not by due process of law.

Mycodham v. The People, 13 N. Y. 378; Murray v. Hoboken Co., 18 Howard 272; Brown v. Hummel, 6 Pa. 86; Maugle v. Kansas, 123 U. S. 678.

BISHOP and PEIGHTEL for the defendant.

The act is constitutional. It is exercising the police power of the State. Crary v. Kline, 65 Pa. 399; Am. & Eng. Encyc. of Law, First Ed., Vol. 18 p. 75. The fact that the machine could be used for legitimate purposes does not take it out of the class of devices intended by the statute.

State v. Lewis, 12 Wisc. 483.

OPINION OF THE COURT.

This is an action of replevin to recover possession of a musical slot machine which was summarily seized by the officers. We must presume that they were acting under Act of Mar. 31, 1860, as the ground given to justify the seizure was that it was a gambling machine. The Act of Mar. 31, 1860, after prohibiting various forms of gambling, and prescribing penalties therefore, etc., declares: "It shall be lawful for any sheriff, constable or other officer of justice, with or without warrant, to seize upon, secure and remove any device or machine of any kind, character or description whatsoever, used and employed for the purpose of unlawful gaming, as aforesaid, etc. * * * * And it shall be the duty of such officer to make return in writing to the next term of Quarter Sessions of the proper county, setting forth the nature and description of the device, and the time, place and circumstance under which such seizure was made; and the said court, upon hearing the parties, if they should appear, if satisfied that such machine was employed and used as aforesaid, shall adjudge the same forfeited. * * * * And such adjudication shall be conclusive evidence to establish the legality of such seizure in any court of this Commonwealth in any cause in which the question of its legality shall arise; and in any case in which a decree of forfeiture shall not be pronounced, if said court shall upon the evidence, be satisfied that there was probable cause for the seizure, they shall certify the same, which certificate shall be a bar to any action brought against the officer for or on account of such seizure in those cases in which said officer returns or offers to return such device or machine; and in all cases shall prevent a recovery in damages for any sum beyond the real value of the device or machine seized." In the above act we have a well defined mode of procedure in such cases as the one at bar. This action is permature, as there has certainly been no such adjudication as required by the act. Either the plaintiff or defendant can push the matter to adjudication at the next term of Quarter Sessions, after which the plaintiff, in this action, will have his remedy in either trespass or replevin if there is not sufficient evidence to warrant a decree of forfeiture and the court does not certify that there was probable cause for said seizure. We think the provisions of the above act are clear and amply warrant us in holding that replevin will not lie until such adjudication has been made. See Slovlin v. Com., 106 Pa. 369.

Then we have following the above section the following section of same Act (1860):

"No writ of replevin shall issue for any device or machine seized as aforesaid, nor shall any action be instituted for or on account of such seizure until the court shall have first adjudicated on the premises; but such writ or action shall forthwith on motion be quashed and abated by the court in which it shall be sued or bought."

The constitutionality of the Act of March 31, 1860, has been questioned by the plaintiff, claiming it deprives a person of his goods without due process of law, which is prohibited by the U. S. Constitution. Lord Coke says that the words "*Per Legem Terrae*" means by due process of law and being brought into court to answer according to law. We find this statement in Cooley's Constitutional Limitations, p. 362. Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. The words "due process of law" must be understood to mean that no person shall be deprived by any form of government action of either life, liberty or property, except as the consequence of some judicial proceeding appropriately and legally conducted. Weynhawser v. The People, 3 Kerrian. We are of the opinion after a consideration of the above authorities that "due process of law" is provided for in the Act of March 31, 1860, and as it has stood so long without being declared unconstitutional we think it is entirely in harmony with the provisions of said constitution. We are, therefore, of the opinion that the writ of replevin should be quashed and is hereby quashed.

EBBERT, J.

OPINION OF THE SUPREME COURT.

It is conceded that the plaintiff is entitled to recover, unless the 60th and 61st sections of the act of March 31, 1860, 1 P. & L. 1218, prevent. We omit a quotation of these sections.

It will barely be questioned that the legislature may authorize the taking and confiscating of property used or intended to be used for illegal purposes, *e. g.*, liquors, gambling devices, burglars' tools. If it can fine $500 or $1,000 it can also forfeit specific property.

The device in this case is a "musical slot machine" and it can be put to legitimate as well as to illegitimate uses. But, if it was in fact being put or being intended immediately to be put to illegitimate uses, it can be confiscated. Such has been held with regard to nets, used in unlawful fishing. Lawton v. Steele, 152 U. S. 133; or to oleomargarine, Powell v. Pennsylvania, 127 U. S. 678; or liquors, kept for the purpose of unlawful sale, Mugler v. Kansas, 123 U. S. 623. The penalty of loss of ownership of the *res*, is no more objectionable than any other penalty. *Cf.* Long v. Rainivater, 70 Mo. 152.

The act of 1860 authorizes the seizure of the articles without a warrant. The requirement of a warrant is *inter alia* for the purpose of obtaining the responsibility of some other person than the officer, for the existence of a probable cause. But an officer can at common law, arrest without warrant in certain cases. The constitutional principle found in section 8, Art. 1, of the state constitution, does not preclude the extension of the officer's power thus to arrest or to seize, to cases similar to this.

Had the act of 1860 authorized the officer, on his own opinion of the nature or destination of the slot machine, to destroy it, it would probably have been unconstitutional; the owner, in that case, would have been deprived of his property without the adjudication of a judicial officer of any kind. Allowing him in a subsequent action against the officer, to show that the property was not of the sort of which it was assumed by the officer to be, and, if he showed it, to recover damages, would not satisfy the constitutional requirement. The owner cannot be deprived of his property on the mere chance of getting compensation for it from one from whom compensation may not be able to be wrung by *fi. fa.* or *capias*. *Cf.* Wendt v. Craig, 67 Pa. 424; Craig v. Kline, 65 Pa. 399; Philada. v. Scott, 81 Pa. 80.

The act of 1860 requires the officer to make return of the seizure to the next Court of Quarter Sessions. That court is to hear the parties, and is then to determine whether the device was used for unlawful gaming. If the decision is that it was so used, it is to be destroyed; otherwise it is to be restored to the owner.

The owner is to be dispossessed simply, until the hearing. His final loss of the property through its destruction, depends

on the conclusion of the court. Is the provision adequate?

No trial by jury is provided, but, while the constitution of the State ordains that the right of trial by jury shall be as heretofore, there always have been modes of trial of facts which did not include the employment of a common law jury. The liability of a county or city for destruction by mobs, can be assessed without such a jury; *In re* Pennsylvania Hall, 5 Pa. 204. The forfeiture of loose logs allowed to float down the Susquehanna, can be inflicted by a justice of the peace without a jury. Wendt v. Craig, 67 Pa. 424. *Cf.* Van Swarton v. Commonwealth, 24 Pa. 130. In Kennedy v. Board of Health, 2 Pa. 366, it seems to have been conceded that a board of health could abate nuisances at the expense of individuals, and make *its* judgment as to the fact that the things alleged to be, were in fact nuisances, conclusive. *Cf.* Philada. v. Provident, etc. Trust Co., 132 Pa. 224; Byers v. Commonwealth, 42 Pa. 89. We think that the trial of the fact in question, could be deputed to the court sitting without a jury.

The constitutional provision that nobody shall be deprived of his property without due process of law, is invoked. The 9th section of Art. 1, of the state constitution, enacts "nor can he (*i. e.* one accused of crime) be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land." This clause is not applicable to the case before us. The proceeding is not founded on the guilt of Johnson. The use of the machine may have been by another than the owner, by a lessee, or borrower. Besides, it does not appear that Johnson has been accused. We do not understand that the officer could not seize the machine without also arresting the person who was operating it. But, even if the clause quoted is applicable, it simply requires the judgment of Johnson's peers, or the law of the land. The law of the land does not always prescribe, as we have seen, a trial by peers, *i. e.* by jurors. To condemn to forfeiture by a judge, is to condemn according to the "law of the land" in a constitutional sense.

But the objection to the act is, that it provides for a depriving of property without due process of law *i. e.*, in defiance of the first section of the 14th Amendment of the Federal Constitution. Infringement of this amendment must be found, if at all, (a) in the annexation of the result of destruction to the having, for gambling purposes, of a slot-machine, or (b) in the provision for ascertaining the fact by a judge. We find no prohibition upon states, against making all property used for illicit purposes forfeit and dooming it to destruction. The state can forbid the production of beer, wine or oleomargarine or the having it for the purpose of sale, under a penalty of destruction. It matters not that the substance is capable of effecting some useful and desirable objects. The mischief to be apprehended from its continued existence, may, in the judgment of the legislature, exceed the good. Though the musical slot machine may serve as a music box, or to register the number of customers, this will not compel the legislature to tolerate it, if it may be and in fact is used for illicit purposes. The state may deem it better to do without the possible good, in order to escape the probable evil.

The requirement of "due process of law" does not make a trial by jury necessary. Says Cooley, whom for convenience we may here quote, "The states, therefore, may prescribe their own modes of proceeding and trial; the accusation may be by grand jury or without one; the trial by jury or by court." Const. Law 245.

It does not appear whether the replevin was begun before the close of the next session of the Quarter Sessions or not. We must assume that it was, and for this reason we think the decision of the learned court below correct. Had the policeman neglected to make return to this court as the act of 1860 requires, it is probable that he would become a trespasser *ab initio*, and that Johnson could recover the slot machine in this replevin. The prohibition in the 61st section of the act of 1860 was intended to prevail, only when the officer complied with the directions of the 60th section, and invoked in due time, the judgment of the court.

Judgment affirmed.

WHITE vs. PA. ROLLING MILL CO.

Bill in equity—Circulation of portrait—Right of privacy—Jurisdiction of equity—Bill dismissed.

STATEMENT OF THE CASE.

Complainant, a beautiful young lady, files a bill against the defendant company and asks the court that the said company be restrained and enjoined from circulating her portrait in the shape of lithographic prints, for the purpose of advertisement. The prints were upon flour sacks with the words below, "Our Pride" and above the same, "Penna. Rolling Mill Co." There were no contractural relations between the parties, and it is not known just how the company came into possession of the portrait, but it was not with the consent or with the approval of the complainant. It is not contended that the portrait is libelous. Complainant alleges that she has been humiliated and her good name injured, causing distress of mind and body by reason of the above fact.

SHERBINE and WRIGHT for the complainant.

Courts recognize the right of property in pictures and will restrain publication by others than the owner. 16 Am. and Eng. Enc. of L. 442.

Equity will interfere to prevent a violation of personal legal rights. Pollard v. Photographic Co., L. R. 40 Ch. Div. 345; Corliss v. Walker, 57 Fed. R. 434.

BOUTON for the defendant.

The right of privacy has been specifically denied. Robertson v. Rochester Folding Box Co., 64 N. E. Rep. 442. Plaintiff must recover, if at all, at common law, and there is no recovery in absence of libel. Atkinson v. J. E. Doherty & Co., 46 L. R. A. 220; Cooley, Const. Lim., 6th Ed., 518.

OPINION OF THE COURT.

It was with some hesitation that the Court finally decided to dismiss the bill of the complainant in this suit. A doubt arose as to whether or not weight of authority and long established precedents should not be disregarded and the case be decided upon principle. The issue was decided, as frequently before, by principle giving way to precedent.

In 124 U. S., 210, it was said that the office and jurisdiction of a court of equity, unless enlarged by express statute, were limited to the protection of the rights of property. This has long been the rule both in the English and the American Courts, and although we admit a tendency in the American Courts to go further in the protection of one's rights, it has only been in cases where the injury complained of is of a material nature and not a mere injury to the feelings, as appears in the present suit. It was expressly laid down in a case reported in 46 L. R. A., 219, that an injury to the feelings was a wrong for which the law afforded no remedy.

The complainant also contends that right of privacy is a form of property and as such is and has been protected. The cases in which such a right was protected were those involving a breach of contract, trust or confidence, three elements which do not enter into the case at bar. A case tried in New York and reported in the American Law School Review, presents a similar statement of facts as appears in the suit at bar. In rendering the majority opinion of the Court, Justice Parker said that "the 'so-called right of privacy' has not yet found an abiding place in our jurisprudence." We think that the law laid down in that suit was but the re-affirmance of an established precedent. The case on which complainant mainly relies is that of Corliss v. Walker, reported in 31 L. R. A., 283. We are of the opinion that this case is not in point and will not support their contention. It appears by the report of that case that the injunction was granted because of the breach of conditions annexed to the contract. That part of Justice Colt's opinion cited by the complainant we think is merely dicta, and doubt that it is supported by the weight of authority.

It has been decided that equity has no power to restrain a libelous publication, surely, then, *a fortiori*, it would not have the power to enjoin one not alleged to be libelous.

Still another potent reason for refusing to allow the bill in this suit is the fact that by the Constitution of the U. S. freedom of speech and of the press is granted, whereby the publication of any article or anything is allowed just so long as such publication is not in violation of the laws of society respecting blasphemy, decency, etc., and does not amount to a public offense or cause material injury to other persons, none of which is alleged in the case at bar.

As stated *supra*, we are of the opinion, arrived at with some hesitancy, but founded on the weight of authority, that the bill should be dismissed and the complainant pay the costs.

Judgment affirmed.

KRESS, J.

OPINION OF THE SUPREME COURT.

The first question, in this case, is has the defendant violated and is it threatening to violate any right of the plaintiff? It is vaguely suggested that the plaintiff has a right of "privacy," a right "to be let alone," and that in some way this right is violated by the acts of the defendant.

What is "privacy?" Miss White can, if she wishes to, seclude herself. She may refuse to receive visitors, refrain from appearance on the street, in church, in the ballroom, in the theatre. She may refrain from writing or speaking, or otherwise acting in the presence of others, and thus conceal her emotions and thoughts. This privacy has not been violated.

Has Miss White the right to go to church or upon the street, without being seen? Must others avert or close their eyes, lest they fall upon her visage, and retinal pictures are obtained from it, which translate themselves into visions, sights of her?

She cannot well live at all except in an East Indian Zenana, without having pictures of her face made in the minds of her fellow-creatures, be that face beautiful or ugly, a cause of admiration or of disgust.

The very pigs and dogs on the street steal impressions of it, as they turn their glances upon her, but she has no redress for this degradation of her divine features. If she wishes to prevent pictures of herself in swines' eyes, she must take care not to come into the range of those eyes. No chancellor will assist her.

But, pigs are not printers, and dogs do not practice photography. It is supposed that while she cannot compel her fellowmen to close their eyes as she passes, so that they may not see her, she has a right that they shall not assist others, who do not see her, to form images of her appearance. She wants to limit the publication of her face. to the very persons to whom she shows it. But has she such a right? There are two ways by which others can receive notions of her face, pictorial and graphical. A delineation by photography, or engraving, or painting. A verbal description may be made.

We have not understood that, when one has seen a fellow-creature's face, be it beautiful or ugly, he is by law forbidden to describe it, ever so vividly, accurately, and realistically. He can describe it to one or 20, or 1000, or 10,000 people. No English court has heretofore laid a fetter on the tongue or the pen merely to prevent its truly describing a human countenance. Nor can it matter before what audience the description is given.

What is the difference between a picture and a description, except that the former awakens an image in the mind without the aid of imagination, while the latter simply stimulates the imagination through the word-associations and that the realization of the actual face through the former is more complete and firm, than through the latter? It is safe to say that no right has thus far been recognized, in the owner of a face, that an image of it shall not be fashioned in other minds through pictures of it, or descriptions of it.

The common law has dealt with the subject and by the limitations it has prescribed indicates pretty clearly what sort of right to privacy in this regard there shall be. The truth at common law was no protection to a pictorial representation that would expose one to hatred, contempt, ridicule, etc. Occasionally nature afflicts people with oddities and imperfections that produce laughter or contempt, or disgust, and the publication of representations of these oddities and imperfections would not be justified by its veracity. But, the common law did not prohibit and punish publications of pictures of men that evoked praise, admiration, homage.

But, the recognition by common law of an alleged right is not necessary to its existence. The chancellor, from time to time created rights, or as he would sometimes prefer saying, furnished remedies for already existing rights, which had been recognized to exist, neither by statute nor by the common law, and the effort now is, to induce the chancellor either to create and protect a new right, or to protect what he may be pleased to declare to be an old right that has never yet had definition or defence in the law.

It is a fashion, nowadays, when any body discovers what ought to be, in his judgment, a right, to appeal to the court of equity to make it such. It was very well, in centuries when parliaments were infrequent, and when the topics with which they dealt were few, and the mass of their legislation extremely small, according to modern standards, to ask the chancellor to legislate. For political reasons, the king would not convoke parliament, or quickly prorogued or dissolved it. Its time, when it was in session, was occupied almost exclusively by matters deemed important by the executive. But for the beneficent usurpations of the chancellor, civilization could not well have advanced as it did, unless, perhaps, these very usurpations, making parliament the less necessary, were one reason for their very infrequency and infertility.

The present conditions are very different. We have biennial legislatures, each turning out as many statutes as were formerly created in a half-century. Their very object, if fit object at all they have, is to watch the course of civilization, and to adapt to it the institutions, laws and procedures of the State. If a new right is to be created, the legislature is in Harrisburg to create it. If the time has come to recognize a so-called right of privacy, surely the legislature is the only body that can authentically declare it. To it should be addressed the considerations that have been urged in this court. If convinced that there should be a right of privacy, let them enact it, define it, provide means civil or criminal for defending it. That it is irksome to do this, that success would be doubtful, is surely no good reason for appealing to a chancellor. It is far better, if commands not to publish physiognomies are to be issued, that they should be directed to the people generally, and not to a particular individual by way of rescript or ukase, that the punishment for violation should be knowable in advance, and not depend on the unpredictable caprice of a chancellor, and that, in administering the punishment the judge should not be inflamed by any feeling that the defendant has defied his personal authority, a feeling which is inseparable from the decree of a chancellor for so-called "contempt." The very word is suggestive of the point of view from which he contemplates the delict of the defendant. More than this, it is very desirable that the right of trial by jury should be preserved, as it is not, when the chancellor first launches the command, then declares its infraction, and then fulminates the penalty for contempt. It is equally important that the constitutional maxim against *ex post facto* laws should be observed, and it is not observed, when, after the fact, the chancellor defines the punishment.

It may doubtless be replied, that such considerations as these would have prevented many modern and useful extensions made by the chancellors of their jurisdiction. So they would. It is undoubted that the courts, especially the courts of equity, have asssumed powers from time to time, which it would have been better for them to have received from the ostensible law-maker, the legislative branch, and the very citation of these assumptions, acquiesced in, as justifications for fresh ones, is one of the strongest objections to their having been made. What then? Are we frankly to avow the principle that the chancellor can create new rights and give remedies for them, either openly or under the pretense of simply recognizing old rights and applying old remedies, or are we to adhere to the theory of the tripartite division of functions, and insist that not the chancellor, but the general assembly, shall legislate? The old law forbade pictures tending to bring a man into contempt, etc. The proposed new law is to forbid pictures, true to their beautiful originals, and not tending to bring the originals into contempt. Thus to change the law ought surely to be undertaken by the so called law-making organ, and not by the law-executing department of which the courts are a branch.

It appears that over the picture of the plaintiff, the defendant has printed the words "Our Pride." While the picture itself would not be libelous, we are not prepared to say that if these words awaken any suggestions that tend to lessen the respect of people for the plaintiff, they might not be treated as libelous. Words of praise, used ironically, might be slanderous. The very fact that the defendant has printed the face of the plaintiff, with the words annexed, may indicate a want of

respect, on its part, and so tend to beget a want of respect on the part of the public, or so expose the plaintiff to the raillery, chaffing, of her friends, acts which may imply in a mild form a lessened respect; or may suggest a familiarity on the part of some officer or member of the corporation with the plaintiff that will tend to diminish the public confidence or esteem. But, the common law has provided for the case, if these are correct suppositions. It has furnished a penalty, as also damages. This is its method of prohibiting. Is the chancellor to invent another method? If he thinks the penalty for embezzlement insufficient, is he to launch an injunction against it, and punish for contempt? Or if he thinks an action for damages would yield an insufficient compensation, is he for this reason to issue the injunction? We cannot convince ourselves that the plaintiff needs or can have other redress for the libel, if libel there be, than that provided by the law.

It is to be observed, however, that "it is not contended that the portrait is libelous," and this, apparently, means that the entire publication, words as well as picture, is not to be regarded as libelous.

For the reasons imperfectly indicated, we accept the doctrine of Roberson v. Rochester Folding Box Co., 171 N. Y. 538, and of the learned court below.

Decree affirmed.

CANNING CO. vs. ARTHUR FAKE.

Contracts illegal—Public policy—Rescission, wrongful appropriation of constitution, no ground for.

STATEMENT OF THE CASE.

The plaintiff corporation desired to secure certain legislation at Harrisburg. It employed the defendant to secure the passage of the bill, and gave him $5,000 to use with members of the legislature. Instead of so using it, he appropriated it to his own use, and made no effort to pass the bill. The plaintiff sues to recover the $5,000.

HILLYER AND KNAPPENBERGER for the plaintiff.

The contract is yet executory, hence company may rescind. Parsons on Contracts, vol. 2, p. 146.; Spring Co. v. Knowlton, 103 U. S. 49.

Courts grant relief when parties are not in *pari delicto*. H. and E. Enc., 2d ed., vol. 15, p. 1004; Parkersburg v. Brown, 106 U. S. 487; Spring Co. v. Knowlton, *supra*; Adams v. Goodnow, 101 Mass. 81; Worcester v. Eaton, 11 Mass. 368.

HUBLER for the defandant.

Courts will not enforce a contract which is illegal, or inconsistent with sound morality or public policy. 149 Pa. St. 379; 88 Wallace, (U. S.) 561; 100 Pa. St. 561.

Contract to secure passage of an act by payment of money to legislators, is void as against public policy. 5 Watts and Sargeant 315; 16 Howard U. S. 314.

OPINION OF THE COURT.

The question to be decided in this case seems to be whether or not the plaintiff can rescind an illegal executory contract and recover back the $5,000 paid to defendant. A number of cases have been cited to show that the contract in this case is illegal, but under the view we take of the law it will not be necessary to decide that point.

As far back as 1780, it was held in England by the Court of King's Bench in the case of Lowry v. Bourdieu, 2 Doug. 468, that there was a well defined distinction between executory and executed contracts, and that so long as an illegal contract remained executory, it might be rescinded and money paid on it recovered.

In that case Justice Buller cites and approves the doctrine of a case of Walker v. Chapman, saying: "There was a case of Walker v. Chapman some years ago in this court in which money had been paid to secure a place in the customs. The place had not been procured and the party who paid the money having brought his action to recover it back, it was held that he should recover because the contract was executory." This case seems to be parallel with the case at bar.

In the case of White v. The Franklin Banks, 22 Picks (Mass.) 181, this doctrine was affirmed, and Wilde, J., in a very full and exhaustive opinion traces the doctrine back through the common law, concluding by saying "this was definitely settled as the law in Anbert v. Walsh, 3 Tant 277, and it does not appear that it has since been doubted. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent execution of unlawful contracts and can in no way work injustice to either party."

In Forscht v. Green, 53 Pa. 138, and in McAllister v. Hoffman, 16 S & R. 146, it was held that where one had deposited money with a stakeholder on a gambling contract he could recover it from the stakeholder by giving notice not to pay it to the winner. The same doctrine was held in Morgan v. Beaumont, 121 Mass. 7.

In Peters *et al* v. Grim, 149 Pa. 163, and McNaughton Co. v. Haldeman, 160 Pa. 145, it was held that where money was placed in a stock broker's hands on a gambling contract, if the profits had been disposed of and nothing remained in the hands of the broker but the amount of the original deposit, this money might be recovered. In the former case, Justice Mitchell said "If when the first deposit was made by the plaintiff with directions to buy the stock, he had countermanded the directions before anything was done under them, it could not be pretended that the defendant could have retained the money on the ground of the illegality in the contemplated transaction."

If the plaintiff in this case were seeking to enforce an illegal contract it is plain he could not succeed, but as he is not seeking to enforce it, and, on the other hand, is seeking to rescind it and recover the money paid on it, we can see no reason why he should not be allowed to do so.

The contract is executory, the defendant has done absolutely nothing toward carrying out its terms, and we think it would be unjust and illegal to allow the defendant to keep the $5,000 paid to him by the plaintiff.

Judgment is therefore entered for plaintiff.

WILSON, J.

OPINION OF THE SUPREME COURT.

Fake was employed by the company "to secure the passage" of a bill through the legislature. Five thousand dollars were given to him, not as compensation for his own services, but to be distributed among the members of the legislature. That such an object was illegal, there can be no doubt. *Cf.* Clippinger v. Hepbaugh, 5 W. & S. 315; Spalding v. Ewing, 149 Pa. 375; Clark, Cont. 420. On such a contract no suit could be maintained. Fake could not recover from the company compensation for his services, nor the company from Fake for the neglect or unskilful and therefore ineffectual effort of Fake to obtain the passage of the act.

There are cases which hold that, after A has put money or other property into B's hands, in order that B may by means of it procure an illegal result, A may repent before the use of the money or property and sue to recover it back. A *locus poenitentiae* is conceded to him. Peters v. Grim, 149 Pa. 163. It is sounder policy to allow the party effectively to repent, even with the aid of the court, before the time arrives for the improper use of the money, than to make repentance fruitless.

But, we see no sign of repentance in the case before us. The money was allowed to remain with Fake during the session of the legislature. The complaint now is, not that he had been notified not to use it, and to return it, but that he had "made no effort to pass the bill," *i. e.* to buy the votes necessary to pass it. What appears before us then is simply a *breach* of the contract the company had fully performed, putting the money into Fake's hands to corrupt the legislators. It then awaited the performance by Fake of his part of the contract. It was disappointed. Fake thought it more profitable to him, having the money, to spend it for his own behoof, than upon the venial legislators who impart to Harrisburg its carrion odor. The company's suit is not by way of rescission, but for the breach of the contract. Had Fake used the money in even unsuccessful bribery, surely the company could not audaciously expect to recover it. The non-appropriation of it to the ends contemplated is the *gravamen* of the cause.

It does not appear that Fake contracted to return so much of the $5,000 as he did not spend. His contract was to spend it, and he has failed to keep his contract, in that he did not spend it. To assist him to recover the money, is virtually to assist him to recover damages for the non-performance of Fake's promise. It is true that had the promise been kept possibly the coveted bill would have been enacted, and possibly this bill turned into law would have been worth to the company $20,000. But, what the company lost was simply the probability of the passage of the bill, if $5,000 were spent upon the Harrisburg statesmen, and that probability would

be worth less than the law itself. Whether the $5,000 would be the maximum damage recoverable or not, it is substantially sought as damages. *Cf.* Am. & Eng. Encyc. 998, 1001.

But let us suppose that the theory on which the action proceeds is that of rescission. An objection to it would be, that rescission is not allowed simply because of non-performance by the opposite party. Another is that it would be as seriously against sound public policy to permit rescission when the contract had been illegal and no repentance before the period of performance had supervened, as to allow an action on the contract for non-performance. The company had allowed the $5,000 to remain with Fake, during the session of the legislature, in the expectation that he would spend it on the legislators. It is when it discovers that he has not done so, that it claims the money back, instead of demanding damages for non-performance. Sound policy requires that it shall take the risk, when it makes a contract of this flagitious sort, of the loss of all that it adventures upon it. If it knows that, should the other party not do what he promises, it can secure the aid of the court to compel him at least to pay back what has been paid him, it will be tempted to take the comparatively little hazard. Nay, the right to recover back the money may be more valuable than that to secure damages. Thus, on a trial for damages, the jury might find that the act, if passed, would not have been worth to the plaintiff $5,000. It might also find that the chances of securing the act, even had the money been expended, would not be worth more than one-half of the value of the act passed. To allow the company to recover the money is to lessen the incentives to abstain from entering into such contracts.

To expose Fake to the danger of having to repay the money unless he does what he promises, is also to give him an incentive to do what he has promised, viz: to corrupt the legislature. Surely a sound policy requires that he should know that whether he does what he agrees to do or refrains from doing it, the money cannot be taken from him.

It is well settled that if a contract is performed on both sides, however illegal, neither party can rescind and recover back the consideration furnished by him. There is no good reason for holding that when it has been performed on one side, the performing party can rescind and recover back the consideration furnished by him. It is true that in the latter case the non-performing party has an inequitable advantage over the other, but it is not for the courts to redress inequities between parties which have arisen from a contract made to the detriment of the public and of the state. They should understand that they must repose solely on the honor of their co-contractors, and not at all upon the coercive power of the courts. It is better to employ a rogue to punish a confederate rogue, than to encourage roguery by protecting one of them from the other.

Judgment reversed.

WILLIAM THORPE vs. EDWARD ENSTEIN.

Tort—Trespass—Nuisance—Noxious gases—Damage to growing crops—Jurisdiction of equity—Pa. Coal Co. v. Sanderson distinguished and discussed.

STATEMENT OF THE CASE.

Thorpe owns a parcel of land, having acquired title to the same on April 1st, 1895.

Enstein, on April 1st, 1900, bought an adjoining tract on which was a bed of clay, and for the purpose of manufacturing the same into brick, he subsequently erected a brick kiln and engaged in the making of brick. The fuel used was stone coal.

In the summer of 1902, after the business had been in operation for two years, a kiln was fired and smoke and gases from same settled upon the field of Thorpe on which corn was growing. The corn was injured to the extent of $50. Thorpe sues Enstein.

WILLIS and GILLESPIE for the plaintiff.

The business is a nuisance. Wood on Nuisances, sec. 3. No man's property can be taken directly or indirectly, without compensation under the law of the state. Houck v. Pipe Line, 153 Pa. 375.

If the business affects the use of property or the health of its occupants, even though a proper business conducted in a proper manner, damages will be assessed. Robb v. Carnagie, 145 Pa. 324; McKeon's v. Lee, 51 N. Y. 500; Rylands v. Fletcher, L. R. 3 H. L. 330; Rhodes v. Dunbar, 57

Pa. 274; Susq. Fertilizer Co. v. Mahon, 9 L. R. A. 737; Davis v. Saylor, 133 Mass. 289. The measure of damages is the loss of crops, together with permanent injuries. Robb v. Carnagie, *supra*. Trespass is the proper remedy. Huckenstein's Appeal, 70 Pa. 102.

AMERMAN and SHOMO for the defendant.

An owner may develop the natural resources of his own land in the absence of negligence without paying incident damages to neighboring property. Penna. Coal Co. v. Sanderson, 113 Pa 162; Harvey v. Susq. Coal Co., 201 Pa. 63; Penna. R. R. v. Marchant, 119 Pa. 542; Pfeiffer v. Brown, 165 Pa. 267; Burnard v. Sheley, 135 Ind. 547; Railroad v. Oakes, 94 Tex. 155.

OPINION OF THE COURT.

Action of trespass by A for injury to his growing corn, caused by smoke and gases from defendant B's brick kilns.

The defendant relies almost solely on the case of Sanderson v. Penna. Coal Company, 113 Pa. 143. In this case the land was coal land; its value could be realized in no other way than by bringing the coal to the surface so that it could be prepared for market. The damage was caused by water which was found on the land, and of necessity must be removed in order to produce the coal. The water was something which was found on the land—put there by nature and not brought on by the defendants.

It was discharged from the mines while the defendants were actually developing their own land.

The main ground for the decision was that of necessity. The company must operate its land where the lands lie; and, not to allow the acidulated water which nature created to be removed and deposited in the natural water channels, would stop the development of the property. The discharge of water was the natural and necessary result of the development by the owner, of the resources of his land.

The case at bar can be distinguished from the Sanderson case in many particulars. To those already mentioned, the following may be added: (1) The clay had already been taken from the land when injury occurred. (2) The injury complained of was caused by smoke and gases emitted by defendant's kilns while he was manufacturing a finished article from a raw material. (3) The defendant could have transported the clay to a place where it could be manufactured into brick without injury to anyone. (4) It is not necessary to make brick on the land where the clay may be found. (5) The making of brick was not the necessary and natural result of the development of the defendant's land.

Had the injury been caused while the land was actually being developed, probably the Sanderson case would apply.

The facts in Huckenstine's Appeal, 70 Pa. 102, are similar to those now before us. In that case the plaintiff sought to enjoin the defendant from burning brick on his lands and the Court said in refusing the injunction: "After a careful and full consideration of the case we are compelled to reverse the decree of the Court of Common Pleas and dismiss the bill of the plaintiff at his cost; but, without predjudice to any right they may have to recover in an action at law."

The defendant also contends that where a man manufactures the products of his land into finished articles on the land where the material is produced, he is not liable for injuries done to his neighbor's lands if his business is a lawful business and conducted with care.

We do not concede this to be the law. It is no defence to say that the business is a lawful business and has been conducted with care when the neighbor's lands have been injured in consequence of the business carried on there. Bamford v. Turnley, 9 Jur. U. S. 377. The escape of gas and smoke might cause a man to lose his farm, or might be compelled to lease it, simply because the business which brought about the loss was a lawful business and carried on carefully.

No man's property can be taken directly or indirectly without compensation under the law of this State. Houck v. Pipe Line, 153 Pa. 375. Hence there are cases, and a great many of them, where the defendant is held liable in damages although his business is lawful and carefully conducted. Robb v. Carneige, 145 Pa. 324. Houck v. Pipe Line, *supra*.

It is true that in the cases above cited, the things that did the injury were brought on the land, but we are of the opinion that a recovery would have been allowed in these cases, especially in Robb v. Carneige, if the coal was mined on the land.

We believe that the extension of the doctrine of Sanderson v. Coal Co., to cases of the kind now before us would be attended with serious consequences.

A man might be the owner of a bed of clay which was surrounded on all sides by large wheat fields of other persons, and to allow him to make this clay into bricks, and by the burning process destroy the crops of all his neighbors without any liability on his part, would be a cruel wrong which the law will not permit.

Judgment for plaintiff for fifty dollars.

ALBERTSON, J.

OPINION OF THE SUPREME COURT.

The question presented in this case is simple. Can Enstein convert the clay found on his land into bricks, by a process which involves injury to the corn grown on Thorpe's land?

The injury is caused by smoke and gas. It does not appear that the use of a process which leads to the emission of smoke and gas is negligent, nor that by practicable means such smoke and gas could, if generated, be prevented from reaching Thorpe's land. We shall assume that Enstein *could* not turn his clay into bricks, on these premises, without the generation of the gas and smoke, and that, these being generated, he *could* not restrain them within the boundaries of his own premises It will follow that either Enstein must abstain from making brick out of clay upon these premises, or that Thorpe must suffer a total or partial loss of the crops which, otherwise, he would be able to raise.

Vaguely speaking, one man has no right to produce by the pursuit of a business, injury to another. The exceptions, however, are innumerable. There are cases in which, though injury to one man is wrought by the business of another, equity will not restrain its prosecution, but courts of law will give compensation. There are others in which the person injured can neither secure an injunction nor even damages. He must meekly and patriotically suffer because his injurer is in some sense serving the public, by the business from which the injury springs, or because he is only one of some dozens or hundreds who suffer a like injury. Of the latter case, Pa. Coal Co. v. Sanderson, 113 Pa. 126, is a specimen. Coal mining is very useful to the State; it must be done where the coal is; it cannot be done without acidulating the water of the natural streams in the neighborhood. Therefore, the riparian owners shall not even have damages. The mine owner shall be permitted to mine, for his own advantage, though he destroys the property of others, without compensation to them. The constitution of the State forbids the public from directly taking, injuring or destroying the property of another, without indemnifying the latter, but the mine owner, because his business is useful to the public, may prosecute it at the expense of his neighbors' property rights, without giving a compensation. One might have supposed that if the business of mining could not be carried on without encroaching on the property of others, the profits of the business should in some equitable way be divided between those whose property was thus, without their consent, made to assist, and the mine owner. The interest of the public would have, it is true, forbidden an injunction against the taking, but for that very reason, the owner whose property was, despite his non-consent, made to contribute to the business, should, in the form of damages, have been requitted for the contribution.

In railroad cases, and other cases involving eminent domain, a similar failure to recover adequate compensation may be noticed. From the initial damages for the taking are excluded diminutions of value, arising from sundry causes, and for these diminutions the recovery of damages in later actions of trespass is also excluded.

The principle of Pennsylvania Coal Co. v. Sanderson was not so satisfactory that there has been any anxiety to apply it to other cases. The court of equity would probably not enjoin Enstein from making his bricks on the land whence he dug the clay, but the court of law would not allow the chancellor's reasons to induce the withholding of damages also. The business, it would say, is respectable, useful, lawful. It cannot well be conducted elsewhere than where the clay is found. It cannot well be so conducted that smoke and gas will not escape upon the adjacent lands and injure the crops thereon. Nevertheless, if this use of Thorpe's land, in the manufacture of the bricks, is necessary, Enstein must pay for it. Enstein is not forbidden

thus to dominate Thorpe's land; but, when he does so, he must compensate Thorpe. This is a sensible view. It would be a pity to prevent Enstein's clay being made into bricks, because, by so doing, Thorpe's land would cease to raise wheat, but it is equally a pity to prevent Thorpe's land from raising wheat in order that Enstein's clay might be turned into bricks. Wheat growing and brick making are both laudable, useful, indispensable avocations, and the use of land for both purposes is equally commendable, but there is no more reason for making Thorpe's land servient to Enstein's avocation, than for making Enstein's servient to Thorpe's.

The servitude which Thorpe implies is a passive servitude. Enstein must refrain from using his land in certain ways, because, in so doing, he sends material substances over and upon Thorpe's land. Enstein must simply refrain from sending these noxious substances upon Thorpe's land. The servitude which Enstein desires to establish, is an active one. He wishes the right to send these poisonous particles over Thorpe's land, even without making compensation for it. It is enough to concede to him the exemption from prohibition thus to subjugate Thorpe's land, without, in addition, consenting that he shall subjugate it wholly for his own advantage, and without any indemnity to Thorpe.

The cases cited by the learned court below sustain its conclusion. *Cf.* Gavigan v. Atlantic Refining Co., 186 Pa. 604.

BOLTON vs. IRONS.

Real property—Dower, lien of—The effect of a sale of the land upon the lien and on unpaid instalments.

STATEMENT OF THE CASE.

A died seised of a farm. His heirs joined in a conveyance to B, subject to the payment to C, widow of A, of annually the interest of ⅓ the purchase money during her life and at her death to the heirs of A. B subsequently died and proceedings in partition were had on his estate and the farm conveyed to him by A was allotted to D, a child of B, and a recognizance had for ⅓ of the valuation money, the interest of which is payable to E, widow of B, for life and at her death to her children.

D sells the farm to H, who fails to pay the interest to C. Proceedings were instituted to collect it and a judgment recovered. I purchased at the sale on this judgment; an action brought by E to recover the interest secured by the recognizance; I claims that he took the land discharged of all liens.

KEELOR and CLAYCOMB for plaintiff.

A release of dower must be made by an instrument under seal. Gray v. McCune, 23 Pa. 447; Murphy v. Borland, 92 Pa. 86; Van Strochs estate, 5 Kulp 389; Gourley v. Kenley, 66 Pa. 270.

CORE and WATSON for defendant.

A sale under an order of an Orphans' Court divests dower. Scott v. Croasdale, 1 Yeates 75; Mitchell v Mitchell, 8 Pa. 126; Grant v. Hook, 13 S. and R. 262; Helfrich v. Ohermyer, 15 Pa. 113.

OPINION OF THE COURT.

Dower is that interest or estate which is provided by the law for the widow out of the real property of the husband at common law, and generally in this country it is an estate for life in one-third of his lands, tenements, and hereditaments.

The dower right of a widow cannot be defeated unless she commits such an action that will be a bar to her recovery for dower. Her dower right may also be defeated in the following ways: (1) by joining in a deed with her husband; (2) by obtaining a divorce; (3) by loss of the husband's seisin, whether by the assertion of a paramount title, the breach of a condition, or the expiration of the limitation. In the case at bar, the widow, E, has done nothing to bar her right to dower, but the question before us for decision, is, whether or not, I takes the land free from all liens. After thoroughly examining the cases in this state we find that there are none quite similar to the one at bar, but the law relating to dower is the same. If a recognizance or other collateral security has been taken for the widow's interest, she may maintain the appropriate action thereupon. Myers v. Brodbeck, 110 Pa. 198. The widow may recover the interest on the money charged on the land by distress or otherwise, as rents are recoverable. Davidson's Appeal, 95 Pa. 394; Heller's Appeal, 116 Pa. 534. And again, she may maintain an action of assumpsit or debt, against a terre-tenant, for arrears of dower. Deifendefer v. Eshleman, 113 Pa. 305;

Lerch v. Snyder, 112 Pa. 161; The Borough of York v. Welsh, 117 Pa. 174. In the case at bar C, widow of A, recovered judgment because her interest was not paid. She had no recognizance bond or any collateral security. A recognizance is not necessary to make a lien for dower. A widow's dower right follows the land no matter whether sold at sheriff's sale or private sale. A purchaser is presumed to have notice of such right of widow. Dr. Trickett in his work on "Liens" distinctly states and cites cases as authority, that a lien follows the land, and where a sheriff's sale takes place prior to widow's death, the purchaser takes subject to the duty of paying the interest on that sum to the widow. Trickett on Liens, vol. 3, page 542; Hebner v. Shirk, 2 Walker 165. A widow whose interest in her husband's estate is secured by a recognizance may enforce the payment of interest due her, (Act of March 29, 1832 P. L.), by distress or otherwise as rents in this commonwealth are recovered. Evans and Shearer v. Ross, 107 Pa. 231; De Haven v. Bartholmen, 57 Pa. 156. After a careful search of the subject of "Widow's Dower," both at common law and in Pennsylvania, we cannot find any thing in support of I's claim, that he took free from all liens. We are of the opinion that E is entitled to her one-third interest of the purchase money payable annually. Judgment is accordingly granted in favor of E.

L. B. C. DELANEY, J.

OPINION OF THE SUPREME COURT.

The charge in favor of the first widow of the first decedent, was made by the deed under which the land was conveyed to Bolton. When at the death of Bolton, partition of his estate was made, the land was allotted to his son David, who entered into a recognizance for one-third of the valuation, of which the interest was to be annually paid to Mrs. Bolton. David sold the land to Holmes. He omitted to pay the instalments due to the first widow, who thereupon sued him, obtained judgment, and caused a judicial sale of the land to Irons. Irons now fails to pay the interest due to the second widow, Mrs. Bolton, contending that her dower was divested by the sale at which he became purchaser. The learned court below has rejected his contention, and entered judgment for the plaintiff. We are unable to reach the same conclusion.

A sale on a lien later than dower, will discharge the arrears of dower then due, but not the dower. Plumer's Appeal, 11 W. N. C. 144; 3 Liens, 541. A sale on a judgment or decree for an instalment of dower will discharge the instalments then mature, but not the dower itself, nor instalments thereafter to fall due. Jones' Appeal, 14 W. N. C. 313; Tospon v. Sipes, 116 Pa. 588.

The question before us is different. It is whether a sale for an instalment of an earlier dower, will cut off, divest the later dower.

The principle is perhaps universal, that a sale necessary to secure satisfaction of an earlier lien, divests all later liens. Thus a sale on second mortgage will divest the third mortgage, though not the first. If the sale on the second mortgage were subject to the third, the third would in fact be preferred to the second. The purchaser would pay only the price of the land diminished by the first and third mortgages. The second mortgage would take only what was left. If no purchaser would pay more than the sum of the first and third mortgages, there could be no sale.

It matters not whether the sale is for the whole of the first mortgage or only for one of several bonds secured by it. The sale would divest the whole of the second mortgage, and the proceeds would be applied *pro rata* to all the bonds, as well those not sued as that on which the suit was founded.

Nor can it matter that the first charge is a dower, and that a sale for an instalment will not divest the dower itself. Both the dower principal and the annual instalments are charges prior in virtue to a later dower, or other charge. If the land cannot be sold on a judgment for annual instalments, except as saddled with a later dower, the first widow might be precluded from ever obtaining payment. Should the land become worth no more than the second charge, no purchaser would buy it. To the dower fund was originally attached a right to appropriate the whole value of the land to the widow and heirs. If a second dower can be created which shall cleave inseparably to that land, the first dower now attaches virtually only to the difference between the whole value of the land and the second dower charge.

We know not for how much Irons bought the land. He had a right to assume that all charges subsequent to the first widow's dower would be divested, and that the price bid by him would represent its full value less anterior charges, and the principal of the first dower. If, after paying the instalments then due on the first dower, there remained anything, it was the duty of the owner of the second dower fund to see that this remainder was properly invested, in order that it might yield an annual payment to Mrs. Bolton. To this remainder, and not to Irons, the purchaser, it was necessary to look. It follows that Irons holds the land free from Mrs. Bolton's dower, and he cannot be compelled to pay the instalments falling due since his purchase.

Judgment reversed, and judgment for the defendant.

BROWN vs. DIX'S ADMINISTRATOR.

Decedents' estates—Advancements, how distinguished from gifts—Declarations of decedent as evidence of either

STATEMENT OF THE CASE.

Mrs. Dix died in 1902 leaving four sons and daughters; and children of a deceased daughter. In 1899 Mrs. Dix gave to each of her four living children $10,000, or the equivalent in real estate. Soon after this she told one of her grand-daughters, in the presence of one of her daughters, that she intended all to have the same, "that the grand-children were to have what would have gone to their mother, if she had been living." Also told her sister that she intended to give the grand-children the same amount, but she didn't want to give it to them until they needed it. That they were then too young.

The administrator claims she intended it a gift. Brown, guardian of the children, brings this action to recover the $10,000 due them, claiming it was an advancement.

JONES and EBBERT for plaintiff.

Whether a transfer of property is a gift or an advancement is a question of intention of the parent at the time the transfer was made. Merkel's Appeal, 89 Pa. 340; Eshelman's Estate, 135 Pa. 160; Miller's Appeal, 40 Pa. 57; Lawson's Appeal, 23 Pa. 85.

To establish this intention the declarations of the parent at the time of making the transfer are admissible in evidence. Frey v. Heydt, 116 Pa. 601; Weaver's Appeal, 63 Pa. 309; Harris' Appeal, 2 Grant 304.

LONGBOTTOM and YEAGLEY for defendant.

An absolute transfer of property by a parent to a child is presumed in the first instance to be a gift. Kerley's Appeal, 109 Pa. 41; Candor's Appeal, 27 Pa. 119.

The declarations of the parent are inadmissible unless shown to be part of the *res gestae*. Frey v. Heydt, 116 Pa. 601.

OPINION OF THE COURT.

An absolute transfer of property by a parent to a child, in the absence of explanatory circumstances, is presumed in the first instance to be a gift. An advancement is simply a gift with a condition attached and when such a condition was not expressly annexed by the donor, the burden is upon him who alleges that one was intended.

In discharge of this duty, the plaintiff offered certain declarations of Mrs. Dix, the donor, made subsequently to the date of the transaction. They were objected to on the ground that they were not part of the *res gestae*.

Advancement is a question of intent and such intent must be proven to have been present in the mind of the donor at the time of the transfer. Merkel's Appeal, 89 Pa. 340; Frey v. Heydt, 116 Pa. 601. Declarations of the parent at the time or within such a period thereafter as would constitute them part of the *res gestae* are admissible to prove the nature of the gift intended. Merkel's Appeal, *supra*; Frey v. Heydt, *supra*. The cases do hold that subsequent declarations are admissible to corroborate the acts of the donor at the time of the transaction when such acts themselves indicate that an advancement was intended. See Merkel's Appeal, *supra*, and Frey v. Heydt, *supra*. No such acts, however, are present in this case and no decision has been brought to our notice in which it was held that the declarations of a donor made after the transfer of property by him are admissible to impeach what otherwise was an absolute gift. As between the donor and donee the rights of the latter are as perfect as those of a purchaser for value and it would not be contended that a purchaser's title or rights in goods could be in any way impeached by

the *ex parte* declarations of the vendor.

The fact that the first declaration was made in the presence of one of the donees does not affect the admissibility of the same since it was not assented to and assent, which renders the declaration in effect an admission by the donee, is the only ground upon which it would be admissible. Harris's Appeal, 2 Grant 304.

Again, the identity of the daughter being undisclosed, it would be impossible to charge anyone of them with the effect of the declaration.

The second declaration, in fact, is irrelevant for the purpose offered. It was not a statement of the donor's state of mind at the time of the transaction, tending to throw light upon the same but merely the declaration of a present intention to give the grand-children a certain sum when they needed it.

Neither of the declarations, therefore, are competent evidence.

The plaintiff further contends that judging the amount and character of the gift an advancement will be presumed. The facts do not disclose the value of Mrs. Dix's estate at the time or at any other time. All that is stated is that $10,000 was given by her to four of her children. Although the amount given to each was large in comparison to the average person's estate, can we safely presume that Mrs. Dix acted unnaturally and gave to her children an amount which in proportion to her estate was so large that an advancement would be the only safe inference? We think not. To hold, in the absence of knowledge of the value of Mrs. Dix's estate, that she intended to make an advancement, would be to attribute to her conduct unbecoming the average parent, who does not give to a child an amount which, in view of his estate, is so large that the law will presume that an advancement was intended.

The reason upon which the rule is based is the best answer to the request for its application in this case.

Then as to the nature of the subject matter of the gift. A grant of land by a parent to a child is *prima facie* an advancement: Lewis's Appeal, 127 Pa. 127. The facts state that Mrs. Dix "gave to each of her living children $10,000, or the equivalent in real estate." What part of the $10,000 represented realty? Unless we can discover a positive answer to this question from the facts themselves, the presumption cannot be raised. The facts do not contain it.

Upon no ground can there be a recovery by the plaintiff.

Judgment for defendant.

GERBER, J.

OPINION OF THE SUPREME COURT.

We see no error in the judgment of the learned court below. This is an action in the common pleas against the administrator to recover an advancement which the deceased is alleged to have intended to make, but did not make. There is no precedent for such on action. The disappointed grand-children may, in the distribution of the fund in the administrator's hands in the Orphans' Court, insist that the advancements made to the four children shall be regarded as anticipatory payments *pro tanto* of their shares of the estate, and that thus the portions of the money actually undergoing distribution, to be paid to the grand-children, shall be enlarged. There is no other remedy.

Conveyance, of land, gratuitously by a parent or by another at his instance, and for a consideration furnished by him, are, in the absence of a different intention, taken to be advancements. The evidence unfortunately does not show how large a part of the alleged advancement was in the form of land, nor to which of the four children land was conveyed. We cannot find from it, therefore, which of the four children was advanced, nor to what extent any of them was advanced.

The intention to advance must exist when the transfer of property to a child by the parent is made. The declaration of Mrs. Dix after the gift to the four children, that she intended all the children to have the same, the children of the deceased daughter taking what would have gone to their mother, could not well qualify the gift already made. Further discussion of the case is unnecessary. We are satisfied that it has been correctly disposed of by the learned court below.

Judgment affirmed.

MINOR vs. IMPERIAL CO.

Trespass—Malicious prosecution—Probable cause—Exemplary damages—Liability of master for actions of servant.

STATEMENT OF THE CASE.

Minor purchased articles at the store of the defendant, paying for them. They were sent to his home in the defendant's wagon, the driver being instructed to collect the money before delivery. The goods were handed to Minor with the statement that the price, $4.23, was to be paid. Minor replied that he had paid. The driver declaring that his orders were not to leave the goods unless they were paid for, demanded them back. Minor refusing to deliver them, and excitedly resisting the driver, the latter went off and made information against Minor for larceny. Brought before the justice he was committed for trial. Subsequently on *habeas corpus* he was discharged.

The president of the company appeared at the hearing and stated the facts, declaring that a mistake of a servant of the company had been made in directing the driver to collect.

This action is brought for a malicious prosecution and the court allowed the jury to assess vindictive damages.

ALBERTSON and HILLYER for the plaintiff.

Punitive damages are assessable in Pa. Porter v. Seiler, 23 Pa. 424; Heiling v. Henderson, 161 Pa. 553.

Release of defendant by *habeas corpus* is sufficient termination of the prosecution. Zebley v. Storey, 117 Pa. 478.

Malice may be inferred from want of probable cause. Bigelow on Torts, pp. 107; Deitz v. Longfitt, 63 Pa. 234; Bunor v. Dunlap, 94 Pa. 239.

Belief in a right to do a certain act will not shield a party from punitive damages, if the act is done in a wanton or reckless manner. A. & E. Enc. of Law 2nd Ed., vol. 12 pp. 25; Dalton v. Beers, 38 Conn. 529.

DIVELY and KNAPPENBERGER for the defendant.

Probable cause for the institution of a criminal proceeding is the existence of facts sufficient to induce in the mind of a reasonable man, a belief in the guilt of the accused.

Cooper v. Hart & Co., 147 Pa. 594; Smith v. Ege, 52 Pa. 419. Excessive fraud, wantonness, or other circumstances to call for exemplary damages, do not appear. R. R. Co. v. Kelly, 31 Pa. 372. Agent acted without the scope of his authority, hence the company is not liable. Clark on Corp. p. 526; R. R. Co. v. Brewer, 78 Md. 394.

OPINION OF THE COURT.

This was an action of trespass to recover damages for a malicious prosecution instituted by the defendant against the plaintiff.

The first question that presents itself is: is this company liable for the conduct of this servant, and was this servant acting in the scope of the company's authority, and was he clothed with the right to pursue the course that he did? If he was clothed with this right expressly or impliedly then the company is liable. The principle of the rule is stated by Andrews, J., Rounds v. Delaware & L. W. R. Co., 64 N. Y. 129, as follows: "Where authority is conferred to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and when it involves the discretion of the servant of the use of force towards or against another, the use of such discretion or force is a part of the thing authorized, and, when exercised, becomes, as to third persons, the discretion of the act of the master. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion or from infirmity of temper, or under the influence of passion, aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another."

To sustain an action for a malicious prosecution there are three essential elements necessary to be established or the action will fall. There must be (1) a termination of the prosecution; (2) want of probable cause; (3) malice.

First, there was such a termination of the prosecution as would allow the defendant to maintain this action. Abell v. Charles, Brightly 131, holds that a discharge on *habeas corpus* puts an end to a criminal prosecution, so as to enable the defendant therein to maintain an action for malicious prosecution. Zerby v. Story, 117 Pa. 489.

Second, there was want of probable cause. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party guilty of the offense. Probable cause is shown for a prosecution for larceny, where it appears that the person accused has taken the prosecutor's property and is unable to give a reasonable excuse for not returning it. Mitchel v. Logan, 172 Pa. 349; McClafferty v. Philip, 151 Pa. 86. Observe the conduct of this driver when he delivered the goods to the plaintiff, and demanded the money for them. The plaintiff told him that he had paid for them, but the driver denied. Simply on the ground that a servant had given him orders to collect the money for the goods, he demands the goods back which the plaintiff refused to hand over but deliberately and excitedly resisted the driver as any man would have done under the circumstances. The plaintiff had as much right to claim the goods on the ground that he had paid for them, as the driver had to believe that they were not paid for and that he still had a right to hold them for the company. The facts of the case suggest that the plaintiff had more right to hold the goods, as surely a man is conscious of his own acts, while the driver had only the instructions of a servant.

The duty of the driver was to return to the store and ascertain if the goods were paid for, and learn if the plaintiff was the rightful owner of the goods, and then and there have settled all controversy, as a prudent man would have done, but instead of so doing he hurries off to a justice and makes an information against the plaintiff for larceny. The defendant was not justified in pursuing the course that he did when he had no substantial ground for his conduct. And the conclusion is that there is want of probable cause.

Third, there was malice, and this point does not need any discussion, as malice need not be proved; it may be inferred from want of probable cause. Abrahams v. Cooper, 81 Pa. 235; Leahey v. March, 155 Pa. 458.

The court allowed the jury to assess vindictive damages. Lake Shore & Mich. S. R'y v. Rosenzurg, 113 Pa. 535, holds that a corporation is liable for exemplary damages for the acts of its servant done within the scope of his authority, under circumstances which would give such right to the plaintiff as against the servant, were the suit against him instead of the company. Exemplary damages are allowed only where the act complained of had been committed willfully and maliciously, or, in the absence of actual malice, and where it has been committed under circumstances of violence, oppression, outrage, or wanton recklessness. Nagle v. Mullison, 34 Pa. 48.

Was it proper for the court to give the jury the right to decide the question of vindictive damages? In Amer v. Longstreth, 10 Barr 145, Justice Bell said that in an action for trespass, the jury are not confined to the actual damage sustained; they may go beyond that, if the case shows a wanton invasion of the plaintiff's rights, or of any circumstances of aggravation or outrage. This is for the jury to determine, and, within reasonable bounds, it is a matter within their control. Upon no principle of law or equity, is the jury permitted to go beyond compensation in damages unless in cases of gross oppression or aggravation when the jury may assess vindictive damages. Ross v. Story, 1 Barr 190. The jury and not the court are to determine whether it is a proper case for exemplary damages. Nagle v. Mullison, *supra*.

Therefore, the opinion of the court is that the jury was properly allowed to assess vindictive damages.

MOWRY, J.

OPINION OF THE SUPREME COURT.

The articles purchased by Minor, were conveyed to his home by the wagon of the defendant, the driver of which was instructed to collect the money before delivery. It was his task then, when he discovered that Minor, after receiving the goods, was not going to pay for them, to demand them back, and possibly to take them. Minor's resistance prevented the retaking of them. Thereupon the driver went off and made information against Minor. In doing so are we to understand that he represented the company?

There is no affinity between the ordinary work of a wagon-driver and that of instituting criminal prosecutions for his em-

ployer. The company had not expressly authorized him to do so. He had not on previous occasions, so far as appears, done so with the subsequent approbation of the company. The making of the information would not be a reasonable means of his recovering the goods, and discharging his duty to bring them back, should the price not be paid. How then can his act be attributed to the defendant? In Central Railway Co. v. Brewer, 78 Md. 394, Clark, Corporations, p. 526, it was held that a street railway company was not liable for a malicious prosecution of a passenger even by its president and superintendent, on a charge of dropping a lead nickel in the fare box, unless he had express authority, or his act was ratified by the company. In Craver v. Bloomingdale, 171 N. Y. 439, the jury were permitted to find the defendant liable, because there was evidence from the conduct of the business through the intervention of the driver, etc., of his authority to do the act. We think it was error to allow the jury to attribute to the defendant, the act of the driver.

Nor are we convinced that it was proper to permit the jury to assess vindicatory damages. The driver was misinformed, through the mistake of his employer. He was not bound to believe Minor's declaration that he had paid for the goods. He, probably, had no knowledge of Minor, and it was not absurd for him to suspect that the latter was lying in order to justify his retention of the goods without paying for them. Minor had excitedly resisted the driver, when he demanded the goods back. He should have allowed them to be taken back, or should have paid for them a second time, and awaited rectification of the error, when he should have a conference with the defendant. He knew that the delivery of the goods by the driver was only on the condition that they should be paid for, and he had no right to retain them, if unwilling to comply with that condition. In the face of the conduct of Minor, and with his own conviction that Minor had not paid for the goods, it is not strange that the driver believed that Minor was intending to secure them without paying for them.

It is true that the jury is to say whether the facts call for exemplary damages; but a precondition to their decision that they do is that there shall be sufficient evidence of malice, fraud, outrage, oppression or vindictiveness on the part of the driver. We fail to find such evidence.

Judgment reversed.

JOHN DOE vs. ROBERT REESE AND GEORGE BLANK, AUDITORS OF FELL BOROUGH.

Borough officers—Collateral attack of a de facto official's acts—Such attack not permitted—Report of borough auditors confirmed—Ratification of acts done in the absence of a quorum.

STATEMENT OF THE CASE.

Fell borough consisted of three wards, and there were three councilmen elected from each ward. March 5, 1901, when the council met to organize, there were nine of the councilmen present before the meeting opened. Four of them left before the roll was called, and five of them answered the roll call. Immediately after roll call and before any business was done, one of the five left the room and went home, leaving four of the councilmen present.

The remaining councilmen proceeded to organize, claiming that as the one that left had answered to roll call, they had a quorum, and by instructions of the remaining councilmen, the clerk marked the councilmen that had left and gone home, as voting in the affirmative on all questions and a full quota of borough officers were elected.

At the next meeting of council, the full number were present, and one of the councilmen that had been absent the previous meeting, moved that the proceedings of the previous meeting be ratified. This motion passed by an unanimous vote. Business proceeded in the regular order, bills were paid, and the auditors reported as having audited the affairs and finding them correct. John Doe excepts to this report on the ground that the organization was illegal and the motion to ratify it did not correct it, consequently all business done was illegal.

GERBER and DEVER for the exceptants. BRENNAN and SHERBINE *contra.*

OPINION OF THE COURT.

Before the meeting of council, on March 5, 1901, nine councilmen were present. Four of them left before roll-call, and five answered to the call. Immediately after roll-call, one of these five left the room and went home. There remained, therefore, but four councilmen present.

Four are not a majority of nine, and the presence of a majority of the nine was necessary to the transaction of any business. It may have been the duty of the other five to remain, but this duty is not the equivalent of actually remaining. The borough is not represented by but four councilmen, and acts of these four are not its acts

It seems that the secretary has mentioned in the minutes the fact that five answered to the roll-call. He has not mentioned the subsequent withdrawal of one of them. On the contrary he falsified the record by noting that this in fact absent member voted affirmatively on all questions.

The four members, claiming, with the member who had left after roll-call, to be a quorum, proceeded to elect the borough officers, a treasurer, a secretary, etc. The four corporally present, and the ghostly fifth, unanimously elected A for the first of these offices and B for the second.

At the next meeting of council, all being present, one of those who had been absent at the former meeting, moved that the proceedings of that meeting be ratified. The law prescribes no formalities for the election of these officers. Formal nomination is unnecessary. The voting may be *viva voce* or by ballot, as the council may choose. Though the time prescribed for organization had elapsed, it was not impossible effectively to elect. Commonwealth v. Steele, 2 North 1. To "ratify" the election to office of A, would be a virtual election of him to that office. Whatever imperfection inhered in the original election would be made innocuous by a second election, in which, too, the vote was unanimous. A is the treasurer of the borough of Fell.

But, suppose that he has not been regularly elected. He has nevertheless been chosen, first by four, and secondly by the unanimous ratification of their choice. Let this be an irregular designation to the office. It is nevertheless, a designation. A has entered upon the duties of the office. He is a *de facto*, if not a *de jure* treasurer. As such, he has paid bills drawn upon him. It is a well settled principle that the acts of a *de facto* officer cannot be collaterally attacked. Shartzer v. School District, 90 Pa. 192; Campbell v. Commonwealth, 96 Pa. 344; Commonwealth v. Valsalka, 181 Pa. 17; King v. Phila. Co., 154 Pa. 160; Keyser v. McKeisan, 2 R. 139; Clark v. Commonwealth, 29 Pa. 129.

What else than a collateral attack is attempted here? The treasurer has submitted his account to the borough auditors, and they have approved of his payments. The decision of the auditors will not estop any citizen from subsequently contesting A's tenure of the office, if right to contest they would otherwise have. So long as A is acting as treasurer he should account to the auditors, and no appeal can succeed which denies his right to credits, while holding him subject to debits.

The proper way to determine A's right to the office is a *quo warranto*. It cannot be inquired into by the auditors or by the Common Pleas on appeals from their report.

The exceptions to the report of the borough auditors are dismissed, and the report is approved and confirmed.